

Dale Service Corp. and United Food & Commercial Workers Union, Local 400, AFL-CIO. Case 5-CA-14158

10 April 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 31 August 1982 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding¹ finding that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing, since on or about 3 March 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees in a unit found to be appropriate.² As a remedy for the unfair labor practice found, the Board, in part, ordered the Respondent to bargain with the Union as the exclusive representative of the employees in that unit and, if an understanding was reached, to embody such an understanding in a signed agreement.

Thereafter the Board filed an application for enforcement of its Order with the United States Court of Appeals for the Fourth Circuit. Subsequently, on 7 March 1983, the Board issued its Decision in *Big Rivers Electric Corp.*³ In that case the Board overruled *Maine Yankee Atomic Power Co.*,⁴ upon which the Regional Director had relied in the representation proceedings underlying the present case. Thereafter, the Board decided to reconsider its decision in this proceeding in light of its Decision in *Big Rivers*, supra. Accordingly, the Board filed a motion for leave to withdraw, without prejudice, its application for enforcement and to withdraw the record from the Fourth Circuit. On 30 June 1983 the court ordered that the application for enforcement be dismissed and remanded the case to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon reconsideration of the entire record in this proceeding, the Board has decided to vacate its previous Decision and Order, and to deny Gener-

al's Motion for Summary Judgment. The Board has further decided to reopen the record in Case 5-RC-11694, and to remand this case to the Regional Director for Region 5 to conduct a second election.

As noted above, the Union was certified in a bargaining unit that included senior operators. The Regional Director for Region 5 found that senior operators exercised none of the attributes set forth in Section 2(11) of the Act and therefore concluded that they were employees within the meaning of the Act. For the following reasons, we disagree.

The record in the representation case reveals that the Respondent operates a sewage treatment plant on a 24-hour-per-day, 7-day-per-week basis. At its facility, the Respondent employs an operations manager and an assistant general manager who are admitted supervisors, four senior operators,⁵ three operators, and five maintenance employees. A normal day crew consists of one senior operator, one operator, and one to five maintenance employees; a normal night crew consists of one senior operator and one operator.⁶ The managers both work Mondays through Fridays, with their combined work hours covering the periods from 7:30 a.m. to 5 or 5:30 p.m. Thus, during the weekday night shift and on weekends, senior operators are the highest ranking personnel at the Respondent's facility.

In the course of their jobs, senior operators and operators perform many of the same functions. Both categories of employees perform laboratory tests, inspect machinery, and operate or monitor a flock press and a biological treatment unit. Senior operators, however, have the following additional responsibility, which we find confers supervisory status: Senior operators have the authority to assign operators to specific tasks,⁷ based in part on the senior operators' assessment of the employees' abilities and the expertise required. Senior operators have the authority to evaluate the workload, and, consequently, to assign overtime work to operators; to send operators home in the absence of work; and to call both operators and maintenance employees in to work, all without the managers'

¹ 263 NLRB No. 114 (not published in Board volumes).

² On 29 January 1982, following a Board election in Case 5-RC-11694, the Union was certified as the exclusive bargaining representative for the employees in the following unit:

All full time and regularly scheduled part time employees, including senior operators, employed by the Respondent at its Woodbridge, Virginia, facility, excluding office clericals, guards and supervisors as defined in the Act.

³ 266 NLRB 380.

⁴ 239 NLRB 1216 (1979).

⁵ The Union refers to the workers in the disputed classification as senior operators, while the Respondent designates these individuals as shift supervisors. Although we attach some significance to the Respondent's conferred title, we will refer to these individuals as senior operators.

⁶ Shifts differ for each class of employees. Maintenance personnel normally work only on the day shift. Operators work in 8-hour shifts covering 24 hours each day. Senior operators work in 10-hour shifts, from 5 a.m. to 3:30 p.m. and from 7 p.m. to 5:30 a.m.

⁷ An operations manual outlines tasks to be performed at specific times, and work varies little day to day. Within such confines, however, the senior operator determines the particular duty an operator or senior operator will perform. According to the testimony of the Respondent's assistant general manager, the tasks vary considerably in desirability.

prior approval. In the course of their duties, senior operators must make operational decisions regarding the adjustment of equipment. These decisions are based on knowledge and experience, and require the exercise of discretion. Finally, the Respondent's assistant general manager testified that senior operators, when managers are not present, are directly responsible for the operation of the plant and the direction of the work force. This authority was acknowledged by senior operators, who testified that their duties included, "mak[ing] sure everything is running all right" and "basically run[ning] the plant." Based on all of these factors, we find that senior operators responsibly direct employees within the meaning of Section 2(11).⁸

Accordingly, we shall vacate our previous Decision and Order which granted General Counsel's

⁸ In making this finding, we note with emphasis that during the week-day night shift and on the weekends, senior operators are the highest ranking employees present at the Respondent's facility. Both the Board and the circuit courts have noted that this factor is indicative of supervisory status. See *Big Rivers Electric Corp.*, supra; *Colorflo Decorator Products*, 228 NLRB 408 (1977); *Southern Indiana Gas v. NLRB*, 657 F.2d 878 (7th Cir. 1981).

Motion for Summary Judgment, and shall deny that motion; reopen the record in Case 5-RC-11694 and set aside the election conducted on 21 January 1982;⁹ and remand this proceeding to the Regional Director for Region 5 to conduct a second election in a unit consistent with this Decision.

ORDER

IT IS ORDERED that the Board's Decision and Order reported at 263 NLRB No. 114 (Aug. 31, 1982) is vacated and that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the record in Case 5-RC-11694 is reopened, the election conducted on 21 January 1982 is set aside, and this case is remanded to the Regional Director for Region 5 for the purpose of directing a second election consistent with this Decision.

⁹ Although the results of that election showed a unanimous union victory, it was conducted in a unit in which almost 40 percent of the voters are statutory supervisors. In such circumstances we cannot conclude that the election was a fair gauge of the sentiments of the unit employees.